(6)

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

No. 03-1601

In the

# Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
*Petitioners,*

v.

MARK J. ABRAMS,
*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, HAWAII, ILLINOIS, INDIANA, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA, OHIO, OREGON, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, AND VIRGINIA, AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Troy King
*Attorney General*

Kevin C. Newsom
*Solicitor General*
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

November 12, 2004

(Additional counsel for amici curiae are listed inside the front cover.)

## ADDITIONAL COUNSEL

GREGG D. RENKES
ATTORNEY GENERAL
STATE OF ALASKA
P.O. Box 110300
Juneau, AK 99811

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801

DOUGLAS B. MOYLAN
ATTORNEY GENERAL
TERRITORY OF GUAM
Judicial Center 2-200E
12. W. O'Brien Dr.
Hagatna, GU 96910-5174

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
James R. Thompson Ctr.
100 W. Randolph St.
Chicago, IL 60601

STEVE CARTER
ATTORNEY GENERAL
STATE OF INDIANA
Indiana Government
Center South - 5th Floor
302 West Washington St.
Indianapolis, IN 46204

TOM REILLY
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS
1 Ashburton Place
Boston, MA 02108-1698

MIKE MCGRATH
ATTORNEY GENERAL
STATE OF MONTANA
Justice Building
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
100 N. Carson Street
Carson City, NV 89701

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-3428

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court Street N.E.
Salem, Oregon 97301

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Capitol
Complex
East Office Bldg., Suite 320
Salt Lake City, Utah
84114-2320

WILLIAM H. SORRELL
ATTORNEY GENERAL
STATE OF VERMONT
109 State Street
Montpelier, VT 05609

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

## QUESTION PRESENTED

Whether, as held below but contrary to decisions of the Third and Seventh Circuits, the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§1983 and 1988. *See* Pet. at i.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

INTEREST OF AMICI CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

I. Section 332(c)(7) Establishes A Sufficiently "Comprehensive" Remedial Scheme To Preclude Resort To §1983's Generic Cause Of Action. ..... 5

A. *Sea Clammers* And Its Progeny Establish A Clear Rule: Where A Substantive Statute Authorizes Individualized Judicial Review, Its Remedial Scheme May Not Be Circumvented Through Resort To §1983. ..... 7

B. The Clear Rule Established By The *Sea Clammers* Line Of Cases Is Consistent With This Court's Decisions In Related Contexts. ..... 12

C. The Ninth Circuit's "More Is Better" Approach To Comprehensiveness Is Unworkable And Risks Rendering *Sea Clammers* A Dead Letter. ..... 15

D. Reliance On §1983 Is Unnecessary To The Vindication Of §332(c)(7)'s Purposes, Will Give Plaintiffs' Lawyers A Windfall, And Will Frustrate The Efficient Deployment Of New Technology. ..... 17

II. Section 332(c)(7) Does Not Create Private "Rights" Enforceable Under §1983. ..... 21



A. Section 332(c)(7) Contains No "Rights-Creating" Language ..... 23

B. Section 332(c)(7)'s Provisions Are Too Vague To Create §1983-Enforceable Rights. ..... 25

C. Principles Of Federalism Counsel Against Finding §1983-Enforceable Rights In §332(c)(7). ..... 27

D. Section 332(c)(7)'s Limited Judicial Remedy Does Not Indicate The Existence Of §1983-Enforceable Private Rights ..... 28

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

### Cases

*Alexander v. Sandoval*, 532 U.S. 275 (2001) ..... 22, 24

*AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed*, 264 F.3d 1314 (2001) ..... 19

*Blessing v. Freestone*, 520 U.S. 329 (1997) ..... passim

*Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001) ..... 20

*California v. Sierra Club*, 451 U.S. 287 (1981) ..... 22

*Cannon v. University of Chicago*, 441 U.S. 677 (1979) ..... 22

*Cellular Tele. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999) ..... 17, 18

*Dennis v. Higgins*, 498 U.S. 439 (1991) ..... 19

*Edwards v. Balisok*, 520 U.S. 641 (1997) ..... 13

*FERC v. Mississippi*, 456 U.S. 742 (1982) ..... 27

*Gonzaga University v. Doe*, 536 U.S. 273 (2002) ..... passim

*Heck v. Humphrey*, 512 U.S. 477 (1994) ..... 12, 14, 15

*Hensley v. Eckerhart*, 461 U.S. 424 (1983) ..... 20

*Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) ..... 20

*Jones v. United States*, 529 U.S. 848 (2000) ..... 5

*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) ..... 27

*Maine v. Thiboutot*, 448 U.S. 1 (1980) ..... 3



*Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) ..... passim

*Muhammad v. Close*, 124 S. Ct. 1303 (2004) ..... 13

*National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002) ..... 17

*New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002) ..... 17

*Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ..... 29

*Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403 (3d Cir. 1999) ..... 17, 18

*Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981) ..... 4

*Petersburg Cellular P'ship v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) ..... 4

*Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002) ..... 17, 20

*Preiser v. Rodriguez*, 411 U.S. 475 (1973) ..... passim

*PrimeCo Personal Communications Ltd. P'ship v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003) ..... 19

*Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942) ..... 23, 28, 29

*Sierra Club v. Morton*, 405 U.S. 727 (1972) ..... 29

*Smith v. Robinson*, 468 U.S. 992 (1984) ..... 8, 9, 11, 17

*Spencer v. Kemna*, 523 U.S. 1 (1998) ..... 14

*Suter v. Artist M.*, 503 U.S. 347 (1992) ..... 25, 26

*Thompson v. Thompson*, 484 U.S. 174 (1988) ..... 25

*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) ..... 27

*Warth v. Seldin*, 422 U.S. 490 (1975) ..... 27

*Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) .... passim

*Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987) ..... passim

**Statutes**

Communications Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934) ..... i, 1, 5, 14, 20, 23, 29

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ..... 20, 23, 25, 28

28 U.S.C. §2254 ..... 12, 13, 14

42 U.S.C. §1983 ..... passim

42 U.S.C. §1988 ..... i, 9, 18, 19

47 U.S.C. §252 ..... 1

47 U.S.C. §253 ..... 1

47 U.S.C. §332(c)(7) ..... passim

**Other Authorities**

C. Jacques & J. Beerman, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735 (2001) ..... passim

H.R. Conf. Rep. No. 104-458 (Jan. 31, 1996) ..... passim

H.R. Rep. No. 104-204(I), *reprinted in* 1996 U.S.C.C.A.N. 10 (July 24, 1995) ..... 20, 23

S. Rep. No. 94-1011, *reprinted in* 1976 U.S.C.C.A.N. 5908 (June 29, 1976) ..... 18



## INTEREST OF AMICI CURIAE

As explained more fully in the amici States' certiorari-stage brief, the States' interests in this case are threefold. *First*, although petitioner is a California municipality, the Communications Act provision at issue here, 47 U.S.C. §332(c)(7), "repeatedly refers to 'State or local' governments, thus explicitly placing obligations on states." C. Jacques & J. Beermann, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735, 751-52 (2001). *Second*, as they have done when addressing §332(c)(7), lower courts have disagreed whether other provisions of the Act – provisions that directly target States and their officers, *see, e.g.*, 47 U.S.C. §§252, 253 – may be enforced via 42 U.S.C. §1983's generic cause of action. *Third*, and most importantly, the amici States, whose officers and employees are perhaps the most frequent defendants in suits brought under §1983, have a keen interest in preventing the unwarranted extension of §1983 into areas governed by other, more specific remedial regimes. The rule of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) – like the rule of *Preiser v. Rodriguez*, 411 U.S. 475 (1973) – serves the important function of precluding plaintiffs from invoking §1983's open-ended remedial regime where Congress has exercised its prerogative to establish a more specific, and more limited, cause of action.

## SUMMARY OF ARGUMENT

Because 47 U.S.C. §332(c)(7) both (i) establishes its own "comprehensive" remedial scheme and (ii) fails to create private "rights," its dictates may not be enforced via §1983. Because the former condition is dispositive here, the Court needn't reach the latter.

1. Section 332(c)(7), which expressly provides to any person "adversely affected" by a local zoning authority's decision a private cause of action "in any court of competent

jurisdiction," entails a sufficiently comprehensive remedial scheme to preclude resort to §1983.

a. Read together, this Court's decisions – from *Sea Clammers* to *Gonzaga* – establish a clear rule: Where Congress goes to the trouble of prescribing a private cause of action to enforce a statute's directives – at least where, as here, that cause of action entails some form of individualized *judicial* review – the rules, restrictions, and remedies that attend that cause of action govern, and may not be circumvented through resort to §1983's generic terms. Statutes the Court has found insufficiently comprehensive to preempt §1983 have uniformly relied entirely on agency enforcement, and made no provision for private suits.

b. The clear rule established in *Sea Clammers* and its progeny squares with this Court's decisions in the *Preiser-Heck* line of cases. The point of those decisions has been that the specific habeas corpus statute – both the cause of action it authorizes and the limitations it imposes on that cause of action – trumps §1983's general terms. So, too, here, a plaintiff may not simply bypass perceived limitations in §332(c)(7)'s scheme by suing under §1983.

c. The Ninth Circuit's "more is better" approach to comprehensiveness – here, that §332(c)(7) is insufficiently beneficial to plaintiffs – is unworkable. It offers no principled basis for distinguishing one statutory cause of action (with its unique package of rules and remedies) from the next. Worse, the Ninth Circuit's view – at its logical extreme, that *any* restriction on a plaintiff's ability to recover on an underlying statute's cause of action justifies a conclusion that §1983 remains available – risks extinguishing the *Sea Clammers* rule altogether.

d. Reliance on §1983 is unnecessary to the achievement of §332(c)(7)'s purposes. Time and again, wireless operators have sued to enforce §332(c)(7) – and obtained injunctive relief permitting construction – without relying on §1983. The recent rush to §1983 has been fueled by the prospect of recouping attorney's fees. In the long run, however, large fee awards will only further enrich



communications conglomerates at the expense of local governments and impede the roll-out of new technology.

2. Section 332(c)(7) does not "unambiguously" create private "rights" enforceable under §1983.

a. Section 332(c)(7)'s substantive provisions are addressed to the entities being regulated (here, local zoning boards) rather than to those seeking protection (would-be wireless operators). Accordingly, unlike Titles VI and IX, §332(c)(7) entirely lacks the sort of rights-creating language necessary to the recognition of §1983-enforceable rights.

b. Section 332(c)(7)'s provisions are also too "vague and amorphous" to create privately enforceable rights. The key terms "unreasonabl[e] discriminat[ion]," "effect[ive] prohibit[ion]," and "reasonable period" are not defined or clarified anywhere in the statute, implementing regulations, or legislative history.

c. Principles of federalism counsel against finding federally-enforceable rights in §332(c)(7). Not only is there no indication that Congress intended to *upset* the deference traditionally owed to local zoning decisions, the relevant evidence shows that Congress sought, as §332(c)(7)'s title plainly states, to "preserve" local zoning authority.

d. Section 332(c)(7)(v)'s limited judicial remedy does not indicate the existence of §1983-enforceable rights. That subsection merely gives aggrieved individuals standing (and a cause of action) to enforce §332(c)(7)'s provisions. It does not alter the fundamental nature – *i.e.*, public, not private – of the rights those provisions protect.

## ARGUMENT

The general federal civil-rights statute, 42 U.S.C. §1983, provides a cause of action for persons alleging deprivations of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the question arose whether §1983's "and laws" clause should be read (i) in light of its Reconstruction-era pedigree, to authorize only those suits

alleging violations of federal statutes aimed at protecting "equal rights," or (ii) literally, to sanction suits alleging violations of any federal statute. Over Justice Powell's vigorous dissent, *see id.* at 11-34, the Court opted for the latter interpretation, *see id.* at 4-8.

The following year, however, this Court "recognized two exceptions to the application of §1983 to statutory violations": first, where Congress has either expressly or impliedly "foreclosed private enforcement of [a] statute in the enactment itself"; and second, where the statute in question is not "the kind that create[s] enforceable 'rights' under §1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)). Because the Court in *Sea Clammers* concluded that "Congress [had] foreclosed a §1983 remedy" in the statutes there at issue, it found no need to reach the "second question" whether those statutes "created 'rights, privileges, or immunities' within the meaning of §1983." *Id.*

This case presents the same questions – and requires the same answer. As an initial matter, because Congress established in 47 U.S.C. §332(c)(7) a "comprehensive" remedial scheme to address alleged violations of that statute, resort may not be had to §1983's generic cause of action. Accordingly, here, as in *Sea Clammers*, the Court need not address the question whether §332(c)(7) gives rise to private "rights" enforceable under §1983. Even if the Court were to address that question, the answer, we submit, would be a clear no.[1]

[1] We note at the outset that several of §332(c)(7)'s substantive provisions have been assailed, with some success, as an effort to "compel[] state and local governments to administer a federal regulatory program," in violation of the Tenth Amendment's anti-commandeering principles. *Petersburg Cellular P'ship v. Board of Supervisors*, 205 F.3d 688, 702 (4th Cir. 2000) (opinion of Niemeyer, J.); *see also* Jacques & Beermann, *supra* at 1, at 772-86 (§332(c)(7) violates the Tenth Amendment). *But cf. Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (summarily rejecting Tenth Amendment challenge). Although no Tenth Amendment question is presented here, §332(c)(7)'s constitutional infirmities may well counsel against its private enforcement through §1983. *See, e.g., Jones v. United States*, 529 U.S. 848, 857 (2000).



## I. Section 332(c)(7) Establishes A Sufficiently "Comprehensive" Remedial Scheme To Preclude Resort To §1983's Generic Cause Of Action.

In *Sea Clammers*, this Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983." 453 U.S. at 20. Accordingly, the Court emphasized, when "'a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under §1983.'" *Id.* (citation omitted). The principal question in this case is whether the private cause of action codified at 47 U.S.C. §332(c)(7) is sufficiently "comprehensive" within the meaning of *Sea Clammers* to preclude resort to §1983.

Section 332(c)(7) prescribes an express private cause of action for expedited judicial review to redress violations of the Communications Act's wireless equipment-siting provisions:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis ....

47 U.S.C. §332(c)(7)(B)(v).

In the decision below, the Ninth Circuit held that §332(c)(7)'s remedial scheme is not sufficiently comprehensive to preempt §1983 suits. The court acknowledged that §332(c)(7) provides for a private cause of action "by allowing aggrieved plaintiffs the right to bring an

action in any court of competent jurisdiction ...." Pet. App. 6a. But, the Ninth Circuit said, "the statute grants no remedies beyond procedural rights." *Id.* It does not, for instance, "explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs." *Id.* at 5a. "Rather," the court observed, §332(c)(7) "only provides a short statute of limitations (30 days), expedited judicial review, and avenues through which a plaintiff can redress [statutory] violations" in court. *Id.* That, from the Ninth Circuit's perspective, was not enough.

In deciding as it did, the Ninth Circuit embraced what we, for ease of analysis, have called a "more is better" approach to *Sea Clammers*' comprehensiveness criterion. *See* Br. of the States of Alabama, *et al.*, at 6, 8, 9, 10, 14 (certiorari stage). The Ninth Circuit views a comprehensive statutory scheme as one that is extensive, and specifically one that provides plaintiffs with a host of remedial options - monetary damages, attorney's fees, costs, etc. In finding §332(c)(7)'s remedial scheme not to be comprehensive under *Sea Clammers*, the Ninth Circuit emphasized its view that the section's "[s]hortening [of] the statute of limitations to thirty days imposes a burden on an aggrieved plaintiff, not a benefit," and that "[t]he only benefit to an aggrieved plaintiff" under the section is expedited judicial review. Pet. App. 8a; *see also id.* at 9a (referring to §332(c)(7) as "limiting the plaintiff's remedies"). Furthermore, and consistent with its understanding that a comprehensive scheme should maximize a plaintiff's remedial options, the Ninth Circuit reasoned from the absence in §332(c)(7) of any provision for monetary damages *not* that damages are unavailable in suits seeking to enforce §332(c)(7), but instead that damages (and presumably attorneys fees, as well) may be had through resort to §1983: "While one may argue that the lack of any damages [remedy] in [§332(c)(7)] is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a.



Thus, on the Ninth Circuit's view, the fact that a statute limits the relief a plaintiff may obtain - whether expressly (as by prescribing a short limitations period) or implicitly (as by omitting an express damages provision) - in and of itself indicates that the statute's scheme is not comprehensive under *Sea Clammers*, and that §1983 thus remains available. As we will demonstrate below, the Ninth Circuit' reasoning is flawed on several levels.

### A. *Sea Clammers* And Its Progeny Establish A Clear Rule: Where A Substantive Statute Authorizes Individualized Judicial Review, Its Remedial Scheme May Not Be Circumvented Through Resort To §1983.

The logic underlying the Ninth Circuit's specific decision concerning §332(c)(7) - that limitations on a plaintiff's right of recovery under a statute's remedial scheme render that scheme insufficiently comprehensive to preclude §1983 enforcement - cannot be squared with *Sea Clammers* or the decisions that follow it. Those decisions, we will show, focus not on the procedural rules by which a plaintiff must abide in bringing his cause of action, or the relief to which he is (or is not) entitled under that cause of action, but, instead, on the fact that the plaintiff has a cause of action in court at all. More specifically, the cases demonstrate that where Congress goes to the trouble of expressly establishing a private cause of action to enforce a statute's directives - at least where, as here, that cause of action entails some of form of individualized *judicial* review - the rules, restrictions, and remedies that attend that cause of action govern, and may not be circumvented through resort to §1983's generic terms. A cause of action for judicial review, that is, might not be a *necessary* condition to a finding of comprehensiveness, but it is, this Court's cases show, a *sufficient* condition.

1. The plaintiffs in *Sea Clammers* sued under §1983 for monetary damages stemming from violations of two federal environmental statutes. In finding those statutes' remedial schemes sufficiently comprehensive to preclude resort to

§1983, this Court (as it has since described its decision) "emphasized that several provisions of the Act[s] authorized private persons to initiate enforcement actions." *Blessing v. Freestone*, 520 U.S. 329, 347 (1997) (citing *Sea Clammers*, 453 U.S. at 14, 20). More particularly, the statutes "allow[ed] suits" in federal court "by private citizens." *Sea Clammers*, 453 U.S. at 6. By invoking §1983, the plaintiffs there sought to circumvent two limitations on the prescribed causes of action: (i) a requirement that "citizen plaintiffs must first give notice" of their suits to both EPA and the alleged environmental violator 60 days before filing; and (ii) the statutes' authorization of prospective injunctive, but not monetary, relief. *Id.* at 7. Notably, those limitations are similar to the ones the Ninth Circuit found decisive here – namely, (i) the 30-day filing period and (ii) the lack of any statutory damages remedy. But while the Ninth Circuit found that those limitations rendered §332(c)(7)'s remedial scheme insufficiently comprehensive to preclude resort to §1983, this Court in *Sea Clammers* reached precisely the opposite conclusion. It held that the environmental statutes' remedial schemes – which, again, expressly authorized individual "citizen suits" in federal court – *were* comprehensive despite the restrictions on recovery. Indeed, the whole point in *Sea Clammers* was to preserve the underlying statutes' express causes of action, limitations and all: "[T]he requirements of th[ose] enforcement procedure[s]," this Court held, "may not be bypassed by bringing suit directly under §1983." *Id.* at 20 (internal quotation marks omitted).

2. *Smith v. Robinson*, 468 U.S. 992 (1984), is to the same effect. The plaintiffs there had sued to enforce their rights under the Education of the Handicapped Act and the Fourteenth Amendment. The EHA, this Court has since summarized, expressly provided for "local administrative procedures followed by federal judicial review." *Blessing*, 520 U.S. at 347 (citing *Smith*, 468 U.S. at 1009). But because, like §332(c)(7) here, the EHA gave "no indication that attorney's fees [we]re available in an action to enforce [its]



requirements," 468 U.S. at 1006, the plaintiffs in *Smith* (like the respondent here) sought fees under §1983's fee-shifting provision, §1988. This Court rejected that move. Despite the absence of any provision for fees in the EHA's remedial regime, this Court found that regime to be comprehensive and refused the plaintiffs' effort to "circumvent" the EHA's "carefully tailored scheme" by seeking fees directly through §1983. *Id.* at 1012. Notably for present purposes, this Court in *Smith* observed (echoing the First Circuit's decision, which it affirmed) that *Sea Clammers* stands for the "general proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme" – like the absence of any provision for the payment of attorney's fees – "should not be supplanted by the remedial apparatus of §1983." *Id.* at 1003.

3. Neither *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), nor *Blessing v. Freestone*, 520 U.S. 329, supports the Ninth Circuit's decision here. This Court found the statutes at issue in those cases insufficiently comprehensive to preclude resort to §1983 because they provided only for administrative enforcement by executive agencies (for instance, through the withholding of federal funds); none authorized a private cause of action through which an aggrieved individual could seek redress in court. *See Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 427. Indeed, the Court in *Wright* distinguished *Sea Clammers* and *Smith* for the very reason that the statutes in those cases "themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the §1983 remedy." *Id.*; *see also id.* at 423 (*Sea Clammers* involved "scheme that itself provided for private actions"); *id.* (*Smith* concerned remedial scheme "which itself allowed private parties to seek remedies for violating federal law"). So, too, in *Wilder*, the Court contrasted *Sea Clammers* and *Smith* and emphasized that the statute before it "contain[ed] no comparable provision for private judicial or administrative enforcement." 496 U.S. at

521. And in *Blessing*, the Court likewise stressed that "[u]nlike the federal programs at issue" in *Sea Clammers* and *Smith*, the statute before it "contain[ed] no private remedy – either judicial or administrative – through which aggrieved persons can seek redress." 520 U.S. at 348.

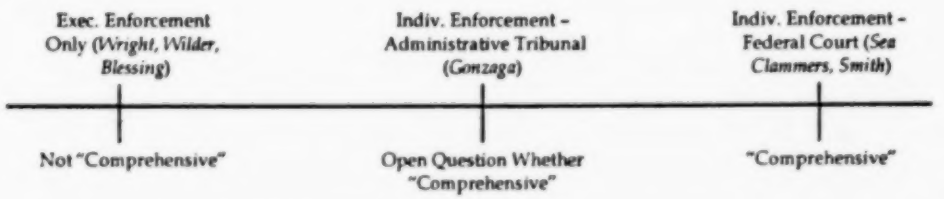
The remedial schemes at issue in *Wright*, *Wilder*, and *Blessing*, therefore, were all fundamentally different from §332(c)(7). Whereas those cases "involved statutes that relied on executive branch enforcement with little, if any, possibility for private enforcement," §332(c)(7) *"relies entirely on private enforcement."* Jacques & Beermann, *supra* at 1, at 754 (emphasis added). Here, the Ninth Circuit itself acknowledged that §332(c)(7) provides for a private cause of action "by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction ...." Pet. App. 6a. Under this Court's decisions, that fact alone is sufficient to preclude suit under §1983; that §332(c)(7)'s cause of action is in some sense circumscribed – for instance, by requiring suit within 30 days and by not providing for damage awards and attorney's fees – does not, as the Ninth Circuit assumed, detract from its comprehensiveness.

4. To summarize, this Court's cases – from *Sea Clammers* to *Blessing* (and beyond) – have dealt with a range of remedial schemes that can be plotted fairly neatly along a continuum. *See* Fig. 1, *infra*. At one end are *Wright*, *Wilder*, and *Blessing*, in which the pertinent statutes depended entirely on agency enforcement and made essentially no provision for private enforcement, "either administrative or judicial." *Blessing*, 520 U.S. at 348. Such statutes, this Court has held, do not entail remedial schemes sufficiently comprehensive to preempt §1983's generic cause of action. In the middle, so to speak, is *Gonzaga University v. Doe*, 536 U.S. 273 (2002); the statute there offered persons aggrieved the right to file "individual written complaints" – but in an administrative, rather than judicial, forum. *Id.* at 289. This Court left open (and may comfortably bypass again today) the question whether that sort of individualized administrative review apparatus is comprehensive in the *Sea*



*Clammers* sense. *See id.* at 290 n.8.[2] *Sea Clammers* and *Smith* – and, as should become clear, this case – occupy the opposite pole. Like §332(c)(7), the statutes at issue in those cases expressly provided for judicial consideration of individual claims, either as an initial matter or on appellate-like review. And in both cases, the Court found the remedial schemes sufficiently comprehensive to preclude resort to §1983.

**Figure 1**


Exec. Enforcement Only (Wright, Wilder, Blessing)
Indiv. Enforcement – Administrative Tribunal (Gonzaga)
Indiv. Enforcement – Federal Court (Sea Clammers, Smith)
Not "Comprehensive"
Open Question Whether "Comprehensive"
"Comprehensive"

Thus, for present purposes, this Court's decisions establish a bright-line rule: Where Congress expressly establishes in a substantive statute a private cause of action through which an aggrieved party can seek redress *in court* (as it did in *Sea Clammers* and *Smith* but did not in *Wright*, *Wilder*, or *Blessing*), the specific procedures, remedies, and restrictions prescribed by that statute govern the operation of the cause of action, and may not be circumvented through resort to §1983's general terms. Put simply, a plaintiff whom Congress has expressly authorized to sue in court on a statutory violation *takes his cause of action as he finds it*. There is no point in getting bogged down in a debate about what forms of relief (damages, fees, etc.) the cause of action does or does not provide. The express cause of action *itself* – at least, where, as here, it authorizes individual suits in federal court – precludes reliance on §1983.[3]

---

[2] The United States has argued that it is. *See* Br. for the United States at 23-27, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (No. 01-679). Amici concur in that view; but, again, the Court needn't address that situation here.

[3] Whether or not a mechanism for judicial review in *state* court (alone) would be sufficiently comprehensive to preempt §1983 is perhaps an open question. *See Wright*, 479 U.S. at 440-41 (O'Connor, J., dissenting) (clear avenue to state court would be sufficient). The Court need not address

Because it expressly "provides a mechanism for judicial relief," H.R. Conf. Rep. No. 104-458, at 208 (Jan. 31, 1996), §332(c)(7) fits squarely within the *Sea Clammers-Smith* category of statutes that preempt §1983. The Ninth Circuit acknowledged that §332(c)(7) provides aggrieved plaintiffs a private cause of action by allowing them to sue "in any court of competent jurisdiction" (Pet. App. 6a), but went on to permit resort to §1983 anyway. In so doing, the Ninth Circuit sanctioned the very sort of end run that this Court's decisions prohibit.

### B. The Clear Rule Established By The *Sea Clammers* Line Of Cases Is Consistent With This Court's Decisions In Related Contexts.

The principle that emerges from the *Sea Clammers* line of cases – that where Congress has expressly created a private cause of action and assigned to it particular procedures and remedies, a plaintiff cannot circumvent those specific rules through resort to §1983 – is part of a bigger picture. Under the banner that a "specific" statute should be read to govern the "general," this Court has enforced similar rules to foreclose §1983 suits in other contexts.

Section 1983's language, of course, is broad. It provides that any person who, acting under the color of state law, deprives another of "his rights, privileges, or immunities secured by the Constitution and laws" of the United States shall be liable "in an action at law, suit in equity, or other proper proceeding for redress." This Court has made clear, though, that §1983's broad language cannot be read literally, else it would swallow up – and displace – other, more specific remedial schemes. Perhaps most notable in this respect have been this Court's decisions concerning the "intersection," or "overlap," of §1983 and the federal habeas corpus statute, 28 U.S.C. §2254. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994);

---

that question today, as §332(c)(7) expressly provides for judicial review in *federal* court at a plaintiff's option.



*Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 540 U.S. 749 (2004). In the first in that line of cases, *Preiser v. Rodriguez*, this Court faced §1983 suits by state prisoners seeking the restoration of good-time credits they claimed had been unconstitutionally revoked. The inmates had sued under §1983 to avoid having to exhaust their state remedies, as the habeas statute expressly requires, *see* 28 U.S.C. §2254(b). "The question before us," this Court said, "is whether state prisoners seeking such redress may obtain equitable relief under [§1983], even though the federal habeas corpus statute, 28 U.S.C. §2254, clearly provides a specific federal remedy." 411 U.S. at 477. In answering that question in the negative, the Court stressed that "[t]he broad language of §1983 ... is not conclusive ...." *Id.* at 489. Emphasizing that "[t]he [§1983] statute is a general one," the Court held that, "despite the literal applicability of [§1983's] terms," the "specific federal habeas corpus statute ... must be understood to be the exclusive remedy in a situation like this where it so clearly applies." *Id.*

This case presents a similar issue, albeit in a different context. Under what circumstances is §1983 available to a plaintiff claiming that a state or local official deprived him of a right created by a federal statute? And, more to the point, when may a plaintiff resort to §1983's generic cause of action rather than utilize the specific cause of action – and accompanying procedures and remedies – available to him under the particular statute he seeks to enforce?

The Ninth Circuit's answer to that question – seemingly, that unless the underlying statute provides not only an avenue into federal court but also the full panoply of remedial options, it cannot be sufficiently comprehensive to preclude resort to §1983 – cannot be squared with this Court's approach to §1983 in the *Preiser-Heck* line of cases. The issue in those cases has never been whether the habeas statute is sufficiently beneficial or advantageous to the complaining inmate (with the result that, if not, §1983 steps in to provide a more robust remedy). In fact, just the opposite is true. The fundamental question in that line of

cases has been whether an inmate may circumvent a specific *limitation* on the habeas statute's express cause of action – typically, the requirement that he exhaust state remedies – by resort to the more general, and more permissive, §1983. *See, e.g., Heck*, 512 U.S. at 480-81; *Preiser*, 411 U.S. at 489-90. This Court has consistently answered no. In *Preiser*, the Court held that "[i]t would wholly frustrate explicit congressional intent to hold that [inmates] could evade [the habeas statute's] requirement[s] by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. Rather, the Court emphasized, where it "clearly applies," the specific habeas statute – both the cause of action it authorizes and the limitations it imposes on that cause of action – "must be understood to be the exclusive remedy available …." *Id.* at 489; *see also Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' §1983 statute in light of the 'specific' federal habeas statute ….").

The Ninth Circuit's analysis here invites the very "frustrat[ion] of explicit congressional intent" that this Court has condemned in the *Preiser-Heck* cases. *See* Jacques & Beermann, *supra* at 1, at 750 (noting the similarities between §1983's interaction with §332(c)(7) and the habeas statute). Again, citing the short 30-day statute of limitations (which it called "a burden on an aggrieved plaintiff, not a benefit") and the "lack of any damages" remedy (or provision for fees), the Ninth Circuit found §332(c)(7)'s remedial scheme not to be comprehensive and, accordingly, held that §1983 must be available. Pet. App. 8a. And again, with respect to the latter issue, the court expressly assumed that the absence of any express provision in the Communications Act for damages implied *not* that Congress "intended to foreclose damages," but instead that Congress "intended to preserve an aggrieved plaintiff's right to invoke §1983." *Id.* at 7a. But that is like saying that because the federal habeas statute imposes an exhaustion requirement, *see* 28 U.S.C. §2254(b), or does not authorize damage awards, *see Preiser*, 411 U.S. at 494, inmates must be able to invoke §1983, which entails



neither limitation. This Court has squarely rejected that view. *See, e.g., Heck*, 512 U.S. at 483-87; *Preiser*, 411 U.S. at 489-90. The same considerations counsel rejection of the logic underlying the Ninth Circuit's decision here.

### C. The Ninth Circuit's "More Is Better" Approach To Comprehensiveness Is Unworkable And Risks Rendering *Sea Clammers* A Dead Letter.

Setting aside its inconsistency with this Court's precedent, the Ninth Circuit's "more is better" approach to comprehensiveness is unworkable and, indeed, has the potential to swallow the *Sea Clammers* rule entirely.

1. The Ninth Circuit's decision concerning §332(c)(7)'s comprehensiveness rests on its belief that the statute imposes too many limitations, and confers too few benefits, on telecommunications plaintiffs. While acknowledging that §332(c)(7) provides for a private cause of action in court (Pet. App. 6a), the Ninth Circuit's opinion repeatedly says, for instance, that §332(c)(7) "does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs" (*id.* at 5a), "grants no remedies beyond procedural rights" (*id.* at 6a), "does not provide for any type of relief" (*id.* at 7a), and "contains no remedies at all" (*id.*). Now, as we explain below, the Ninth Circuit's assumption that §332(c)(7) permits no remedy whatsoever – not even simple injunctive relief – is unwarranted; the courts of appeals have held (uniformly) that injunctive relief, in the form of an order directing local zoning authorities to permit construction, is available under §332(c)(7). *See infra* at 17. But the point remains: In the Ninth Circuit's view, §332(c)(7) just doesn't provide sufficient benefits to plaintiffs to be comprehensive in the *Sea Clammers* sense.

But when, under that "standard," does a remedial scheme become comprehensive? What if §332(c)(7) authorized monetary damage awards, but not attorney's fees? Fees, but not damages? Damages and fees, but not costs? When, on the Ninth Circuit's view, is enough, enough? And mightn't the answer to that question vary

from case to case, statute to statute? The same problem infects the Ninth Circuit's emphasis on §332(c)(7)'s 30-day statute of limitations, which, it says, "imposes a burden on an aggrieved plaintiff, not a benefit." Pet. App. 8a. What if the limitations period were 90 days? Or 180? Or a year? Again, at what point is long enough, long enough? The Ninth Circuit's approach to comprehensiveness offers no principled basis for distinguishing one statutory cause of action (with its particular package of rules and remedies) from the next. It would leave the lower courts to decide *Sea Clammers* issues on an ad hoc, case-by-case basis, and would plunge the law into a state of disarray.

By contrast, the rule suggested by the *Sea Clammers* line of cases offers courts clear guidance: Wherever Congress establishes in a substantive statute an express cause of action for judicial review, that cause of action – with its attendant rules and remedies – controls, and may not be circumvented through resort to §1983. Again, there is no need to quibble over the plaintiff-friendliness of the prescribed procedures and available forms of relief. The plaintiff takes his cause of action as he finds it – and as Congress crafted it.

2. The Ninth Circuit's "more is better" approach suffers from an additional problem. Taken to its logical extreme, the Ninth Circuit's view seems to be that *any* restriction on a plaintiff's ability to recover under a substantive statute's express cause of action – whether a short limitations period, the absence of a damages remedy or fees, or some other – is a basis for finding that §1983 remains available. But by that logic, the whole *Sea Clammers* line of cases evaporates. If, as the Ninth Circuit's decision suggests, any supposed limitation in an underlying statute's remedial scheme could be bridged by resort to §1983, then *Sea Clammers* would have no independent force at all; a statute's remedial scheme would be sufficiently comprehensive to preclude resort to §1983 only when it provided the full complement of remedies (*e.g.*, injunctions, damages, fees) available under §1983 – that is, *only when resort to §1983 would be wholly unnecessary and superfluous.*



But as one Justice observed during oral argument in *Gonzaga*, for a remedial scheme to be comprehensive in the *Sea Clammers* sense, and thus to preempt §1983, it "certainly … doesn't have to be a duplicate of section 1983, or there would be no point in saying it supplants it." Tr. of Oral Arg. 34. Rather, like the *Preiser* rule that preceded it, the *Sea Clammers* rule has bite only when it is used to enforce – and to prevent plaintiffs from "bypass[ing]"or "circumvent[ing]" – limits embodied in underlying statutes' remedial schemes. *Smith*, 468 U.S. at 1012; *Sea Clammers*, 453 U.S. at 20. By using those same limits (here, a short statute of limitations and the absence of a damages remedy) to justify dispensing with the *Sea Clammers* rule and permitting resort to §1983, the Ninth Circuit's decision risks extinguishing the *Sea Clammers* rule altogether.

### D. Reliance On §1983 Is Unnecessary To The Vindication Of §332(c)(7)'s Purposes, Will Give Plaintiffs' Lawyers A Windfall, And Will Frustrate The Efficient Deployment Of New Technology.

Resort to §1983 in this case is not just inconsistent with *Sea Clammers*, but is also unnecessary to the achievement of §332(c)(7)'s objectives. In case after case, wireless operators have sued to enforce §332(c)(7)'s substantive provisions – and won – without relying on §1983. *See, e.g., New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403 (3d Cir. 1999); *Cellular Tele. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999); *see also* Jacques & Beermann, *supra* at 1, at 754 & n.102 (collecting district court cases). Further, the courts of appeals have held (to our knowledge, uniformly) that injunctive relief – specifically, an order directing the relevant state or local zoning authority to permit construction – is available under §332(c)(7). *See New Par*, 301 F.3d at 399-40; *National Tower*, 297 F.3d at 21-22; *Preferred Sites*, 296 F.3d at 1221-22;

*Omnipoint*, 181 F.3d at 410; *Town of Oyster Bay*, 166 F.3d at 497. Indeed, it bears emphasis that the respondent here, Mr. Abrams, prevailed on his §332(c)(7) claim in the district court, which entered a "judgment of injunction" expressly "enjoin[ing], mandat[ing] and compell[ing]" the City to "set aside its earlier resolution denying plaintiff's application" and to "adopt a new resolution granting" that application. Pet. App. 13a-14a.

If, as seems clear, wireless operators like Mr. Abrams can obtain the regulatory approvals they seek through expedited suits for injunctive relief directly under §332(c)(7), what is fueling the recent rush to §1983? The answer seems to us plain enough: *attorney's fees*. Pursuant to the so-called "American rule," attorney's fees are not available under §332(c)(7); 42 U.S.C. §1988, by contrast, expressly authorizes fee awards in suits brought under §1983. Plaintiffs' lawyers thus have an obvious preference for §1983 over §332(c)(7), and an obvious incentive to file their §332(c)(7) suits under §1983's cover. But for three reasons, paying plaintiffs' lawyers' bills seems to us a hollow (if not perverse) reason for disregarding the specific cause of action that Congress established in §332(c)(7) in favor of §1983's more permissive scheme.

1. First, a word about §332(c)(7) plaintiffs. The point of §1988 was to protect the proverbial little guys. As the Senate report accompanying §1988 observes, "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (June 29, 1976). Congress was concerned that "[i]f the cost of private enforcement actions bec[ame] too great, there w[ould] be no private enforcement" and "our civil rights laws" would "become mere hollow pronouncements." *Id.* at 6, 1976 U.S.C.C.A.N. at 5913. But there is little danger that without the prospect of fees §332(c)(7) would become a "hollow pronouncement[]." The telecommunications conglomerates that are typically the plaintiffs in §332(c)(7) cases hardly fit



the mold of the little-guy civil-rights victims Congress had in mind when it enacted §1988. *See PrimeCo Personal Communications Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003) (Posner, J.) (whereas §1988 was "enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers in cases whose social and political significance may dwarf the monetary stakes," "telecommunications enterprises" "have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes"); *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1330 (11th Cir. 2000) (Carnes, J., concurring), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed*, 264 F.3d 1314 (2001) (whereas "Section 1988 was intended to help the civil rights Davids of the world do battle with the governmental Goliaths," telecommunications companies' "financial self-interest and the vast sums at stake make them more than happy to serve as 'private attorneys general' to enforce the legislative measures that they have lobbied through Congress"). *Cf. Dennis v. Higgins*, 498 U.S. 439, 464 (1991) (Kennedy, J., dissenting) (§1988 fee awards should not "merely shift[] the balance of power away from the States and toward interstate businesses").

2. Second, a word about §332(c)(7) defendants. By definition, claims under §332(c)(7) will be against state and local government bodies. More often than not, the defendants will be cash-strapped municipalities doing their level best to discharge their zoning and land-use responsibilities consistently with §332(c)(7)'s dictates. We will leave it to the local government amici to explain in detail the deleterious effects that large attorney's fees awards have had - and would continue to have were the Ninth Circuit affirmed here - on municipal governments. *See, e.g.*, Br. of the National League of Cities, *et al.*, at 11 (certiorari stage) (Localities "face a serious, and potentially disastrous, financial burden if they are required to pay damages and attorneys' fees for inadvertent violations of a specialized federal statute."). For present purposes, it

suffices to state the obvious: that fee awards "may penalize cities and towns that, in good faith, attempted to limit cell towers in ways that ultimately are determined to violate" §332(c)(7), and that even "[t]he potential for substantial awards of attorney's fees may illegitimately deter state and, especially, small local governmental units from exercising their rightful zoning authority." Jacques & Beermann, *supra* at 1, at 770. The sheer *in terrorem* effect of oppressive fee awards (and, for that matter, damage awards) may well be enough to convince small municipalities to get out of the tower-siting business altogether – precisely what Congress did *not* want when it set out in §332(c)(7) to "[p]reserve ... local zoning authority."

3. Finally, a word about systemic impact. This Court has often remarked (with regret) the tendency of attorney's-fees requests to "result in a second major litigation." *E.g.*, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609 (2001); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 766 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The risk of cases bogging down in disputes over fees is particularly acute in the current context given Congress' stated purpose of "encourag[ing] the rapid deployment of new telecommunications technologies," Pub. L. No. 104-104, 110 Stat. 56 (1996), and §332(c)(7)(v)'s express requirement that siting disputes be resolved "expedit[iously]." *See also* H.R. Conf. Rep. 104-458, at 1 ("designed to accelerate rapidly private sector deployment"); *id.* at 113 ("accelerate rapidly"); H.R. Rep. No. 104-204(I), at 47, *reprinted in* 1996 U.S.C.C.A.N. 10, 11 (July 24, 1995) ("rapid deployment"); *id.* at 94, 1996 U.S.C.C.A.N. at 61 ("speed deployment"). Indeed, in the light of these concerns, the Eleventh Circuit has emphasized "the developing case law" holding that simple *injunctive* relief – the form of relief that the courts have uniformly held is available under §332(c)(7) itself, *see supra* at 17 – "best serves the [Communications Act's] explicit goal of expediting resolution of this type of action." *Preferred Sites*, 296 F.3d at 1222 n.13.



## II. Section 332(c)(7) Does Not Create Private "Rights" Enforceable Under §1983.

Should this Court address (which, in view of the foregoing, it needn't) what *Sea Clammers* calls the "second question" whether 47 U.S.C. §332(c)(7) creates any private "rights" enforceable under §1983, it should answer that it does not.[4]

Not every violation of a federal statute works a deprivation of "rights" within the meaning of §1983. "In order to seek redress through §1983 ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340. With respect to the "rights" issue, the pathmarking decision is *Gonzaga University v. Doe*, 536 U.S. 273. There, this Court firmly rejected any supposition that there is a "loose standard for finding rights enforceable by §1983," or that a plaintiff may "enforce a statute under §1983 so long as [he] falls within the general zone of interest that the statute is intended to protect" or is in some sense "benefit[ed]" by it. *Id.* at 282-83. On the contrary, the Court held, nothing "short of an unambiguously conferred right" will suffice to "support a cause of action brought under §1983." *Id.* at 283. In

---

[4] The certiorari-stage briefing – including our own – focused on the comprehensiveness of §332(c)(7)'s remedial scheme for *Sea Clammers* purposes. But the Question Presented – whether §332(c)(7) "may be enforced" via §1983 – "fairly include[s]" the "subsidiary" (and in some senses logically antecedent) question whether §332(c)(7) creates privately enforceable rights at all. Sup. Ct. R. 14.1(a). Moreover, as the United States has correctly observed elsewhere, the "rights" and "remedies" inquiries cannot be "wholly divorced" from one another. *See* Br. for the United States at 23, *Gonzaga*, 536 U.S. 273. By contrast, "the less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that Congress expressly provided." *Id.* As we show in text, the evidence that Congress intended to create §1983-enforceable rights in §332(c)(7) is particularly weak. Whether that weakness is deemed relevant specifically with respect to the "rights" question itself, or derivatively to the "remedies" question, the point is that it *is* relevant to the resolution of this case.

embracing that rigorous standard, the Court looked to its implied-private-right-of-action decisions - with their singular focus on clear congressional intent, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001) - to "guide the determination of whether a statute confers rights enforceable under §1983." 536 U.S. at 283. Indeed, the Court clarified that "the initial inquiry - determining whether a statute confers any right at all - is no different" in the §1983 and implied-right-of-action contexts. *Id.* at 285.

Against that backdrop, the Court in *Gonzaga* held that where a statute's "text and structure" give no indication that Congress intended to create new private rights, "there is no basis for a private suit, whether under §1983 or under an implied right of action." *Id.* at 286. Borrowing from the implied-right-of-action cases, the Court emphasized that a statute creating enforceable private rights "must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979)). In assessing the statute before it - and finding it wanting - the Court observed that the relevant provisions "entirely lack[ed] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.* at 287 (citing *Sandoval*, 532 U.S. at 288-89, and *Cannon*, 441 U.S. at 690 n.13). Specifically, the Court contrasted the statute before it, which was phrased as a prohibition on government regulators ("No funds shall be made available ...."), with "the individually focused terminology of Titles VI and IX," both of which state that "[n]o person ... shall ... be subjected to discrimination." *Id.* at 284 n.3, 287. In sum, the Court said, "'[s]tatutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons."'" *Id.* at 287 (quoting *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))).

*Gonzaga* compels the conclusion that §332(c)(7) does not create §1983-enforceable rights. To start from a somewhat broader perspective, it is settled that the Communications



Act of 1934 "did not create new private rights" and that, by contrast, "[t]he purpose of th[at] Act was to protect the public interest in communications." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942). Nor is there any indication that the Telecommunications Act of 1996 - which, among other things, added §332(c)(7) to the Communications Act - created private, as opposed to public, rights. The 1996 Act's preface describes the statute as an effort to "secure lower prices and higher quality services" for *all* "American telecommunications consumers." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The House and conference reports accompanying the 1996 Act likewise focus not on private interests, but on the collective rights of "all Americans." H.R. Conf. Rep. No. 104-458, at 1; *see also id.* at 113 ("all Americans"); H.R. Rep. No. 104-204(I), at 47-48, 1996 U.S.C.C.A.N. at 11 ("American telecommunications consumers," "American businesses").

The question here, of course, is whether the "specific statutory provision" at issue, 47 U.S.C. §332(c)(7), which was written into the Communications Act as part of the 1996 Act, provides any basis for a contrary conclusion. *See Blessing*, 520 U.S. at 342 ("particular provision"). Measured against *Gonzaga*'s rigorous standard, it is clear that it does not.

### A. Section 332(c)(7) Contains No "Rights-Creating" Language.

There is certainly no basis in §332(c)(7)'s text for finding a congressional intent to create private rights enforceable via §1983. All of the relevant provisions of §332(c)(7) are addressed to the entities being regulated (here, state and local zoning authorities) rather than to those seeking protection (here, wireless operators). Subsection (A) opens with a general reaffirmation of local zoning authority: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government, or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." Subsection (B) then

imposes several "[l]imitations" on local zoning authority. For instance –

- A "State or local government or instrumentality thereof … shall not" through regulation either (i) "unreasonably discriminate among providers of functionally equivalent services" or (ii) "prohibit or have the effect of prohibiting the provision of wireless services." §332(c)(7)(B)(i).
- A "State or local government or instrumentality thereof shall" act on siting and construction requests "within a reasonable period of time … taking into account the nature and scope of such request[s]." §332(c)(7)(B)(ii).
- Any decision of a "State or local government or instrumentality thereof" to deny a siting or construction permit "shall be in writing and supported by substantial evidence contained in a written record." §332(c)(7)(B)(iii).

Significantly for present purposes, all of §332(c)(7)'s substantive provisions "focus on the person regulated rather than the individuals protected." *Gonzaga*, 536 U.S. at 287. They are framed as directives to local zoning officials – prohibitions in some cases, commands in others – *not* as guarantees to individuals. Accordingly, and in stark contrast to statutes like Titles VI and IX, §332(c)(7)'s substantive provisions "entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id.*; *see also id.* at 291 (Breyer, J., concurring in the judgment) (emphasizing "total absence (in the relevant statutory provision) of any reference to individual 'rights' or the like"). Indeed, the absence in §332(c)(7) of any rights-creating language is, if anything, more damning than the similar void in *Gonzaga*. Unlike the statute there, which had been enacted in 1974 during the so-called "*ancien regime*," *Sandoval*, 532 U.S. at 287, when courts took a relatively loose approach to inferring private statutory rights, §332(c)(7) was enacted in



1996, by which time this Court was consistently requiring (at least in its implied-right-of-action decisions) a clear showing of congressional intent to create enforceable rights, *see, e.g.*, *Thompson v. Thompson*, 484 U.S. 174, 179-80 (1988).

This, moreover, is not a case in which §1983-enforceable rights can be discerned through reference to "'the entire legislative enactment.'" *Gonzaga*, 536 U.S. at 296 (Stevens, J., dissenting) (quoting *Suter v. Artist M.*, 503 U.S. 347, 357 (1992)). In *Gonzaga*, Justice Stevens pointed to the use of the term "rights" in the title of the pertinent statute (the "Family Educational *Rights* and Privacy Act") and to the "substantial number of references to 'rights'" in the statutory sections surrounding the provision specifically at issue. *Id.* at 293-94, 296. Here, statutory structure provides no such aid. The word "right" does not appear anywhere in §332, let alone in §332(c)(7) or (c)(8), the two subsections added by the 1996 Act. *See* Pub. L. No. 104-104, §§704(a), 705, 110 Stat. 56, 151-52 (1996). Nor does any of the section headings suggest a focus on private rights: §332 itself is titled "Mobile services"; subsection (c), "Regulatory treatment of mobile services"; and sub-subsection (c)(7), "Preservation of local zoning authority."

### B. Section 332(c)(7)'s Provisions Are Too Vague To Create §1983-Enforceable Rights.

The absence of rights-creating language aside, there is another, separate reason that §332(c)(7) should not be read to create private rights for §1983 purposes. Its substantive provisions, by and large, are simply too "'vague and amorphous'" give rise to enforceable rights. *Blessing*, 520 U.S. at 340 (quoting *Wright*, 479 U.S. at 431-32); *see also Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment) ("Much of the statute's key language is broad and nonspecific."). For instance, §332(c)(7)(B)(i) prohibits local zoning authorities from "unreasonably discriminat[ing]" between providers and from regulating in such a way as to "have the effect of prohibiting" wireless service. But what constitutes "unreasonabl[e] discriminat[ion]"? And when

does local regulation "have the effect of prohibiting" wireless service? Likewise, §332(c)(7)(B)(ii) requires local zoning authorities to act on construction requests within "a reasonable period of time," "taking into account the nature and scope of the request[s]." But what might that "reasonable period" be in any given case?

Those questions are not answered either in the statute itself or in any relevant regulation. This case, therefore, is different from both *Wright* and *Wilder*, in which the Court found enforceable private rights in statutory provisions that centered on the vague term "reasonable." In those cases, either the statutes themselves or their implementing regulations (or both) "specifically set out guidelines" or "factors" for courts to consider in measuring reasonableness. *Wright*, 479 U.S. at 431; *Wilder*, 496 U.S. at 519 & n.17. Here, by contrast, neither §332(c)(7) itself nor an applicable regulation gives any hint as to the meaning, for instance, of the terms "unreasonabl[e] discriminat[ion]," "effect[ive] prohibit[ion]," or "reasonable period." This case, accordingly, is like *Suter v. Artist M.*, 503 U.S. 347, in which this Court held that a federal welfare statute's requirement that States make "reasonable efforts" to prevent the removal of foster children from their homes was too vague to create §1983-enforceable rights. Here, as there, "[n]o further statutory guidance is found as to how" amorphous statutory standards "are to be measured." *Id.* at 360.

Nor does the legislative history offer any meaningful clarification of §332(c)(7)'s vague terms. In fact, with respect to several of those terms, the legislative history only compounds the uncertainty. For instance, with respect to "unreasonabl[e] discriminat[ion]," the conference report merely states that §332(c)(7)(B)(i) gives "localities the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements." H.R. Conf. Rep. 104-458, at 208. As to "effect[ive] prohibit[ion]," the report simply expresses the conferees' intent that "decisions be made on a case-by-case basis." *Id.*



And on the meaning of the phrase "reasonable period of time," the report offers only that it is the "usual period under [local zoning] circumstances" for a hearing, variance, etc., and that requests need not be subjected "to any but the generally applicable time frames for zoning decision[s]." *Id.*

### C. Principles Of Federalism Counsel Against Finding §1983-Enforceable Rights In §332(c)(7).

In refusing to find enforceable private rights in *Gonzaga*, this Court declined to indulge any "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials." 536 U.S. at 286 n.5. So, too, here, recognition of federally-enforceable private rights in §332(c)(7) would undermine a long "tradition of deference" to local zoning and land-use decisions. This Court has repeatedly held that "zoning laws and their provisions ... are peculiarly within the province of state and local legislative authorities," *Warth v. Seldin*, 422 U.S. 490, 508 n. 18 (1975), and, indeed, that "regulation of land use is perhaps the quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 768 n. 30 (1982). Additionally, this Court has recognized that because "[t]he zoning function is traditionally a governmental task requiring the 'balancing [of] numerous competing considerations,'" courts "should properly 'refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.'" *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)).

The affront to federalism would be, if anything, more pronounced here than in *Gonzaga*. Not only is there "no basis in statutory text," 536 U.S. at 286 n.5, to believe that Congress intended to *upset* the deference traditionally owed to state and local land-use decisions, the relevant evidence shows that Congress actually intended, as §332(c)(7)'s title plainly states, to "*[p]reserv[e]* ... local zoning authority." Section 332(c)(7)(A), for starters, establishes the general rule

that §332 does not "limit or affect" local zoning and land-use authority. And, indeed, the legislative history demonstrates that even §332(c)(7)(B)'s several "[l]imitations," far from *displacing* traditional local zoning standards, actually *incorporate* those standards. For instance, §332(c)(7)(B)(i)'s ban on "unreasonabl[e] discriminat[ion]" was specifically designed to "provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted *under generally applicable zoning requirements*." H.R. Conf. Rep. No. 104-458, at 208 (emphasis added). Likewise, in requiring local zoning boards to act on construction requests "within a reasonable period of time," §332(c)(7)(B)(ii), Congress intended merely to subject those requests to "the generally applicable time frames for zoning decision[s]" and, thus, to require decisions within the "usual period under [local zoning] circumstances." *Id.* Accordingly, a decision finding §1983-enforceable rights in §332(c)(7) would federalize large swaths of local zoning practice without any indication in the statute that Congress intended such an incursion – and, indeed, in the face of an apparent contrary intention.

### D. Section 332(c)(7)'s Limited Judicial Remedy Does Not Indicate The Existence Of §1983-Enforceable Private Rights.

Section 332(c)(7)(B)(v) – discussed in detail above, *see supra* at 5-20 – provides to "any person adversely affected" by a local zoning board's decision a limited cause of action "in any court of competent jurisdiction." That subsection does not, as some have casually suggested, "compel[] the conclusion that the [Telecommunications Act] was intended to grant providers at least some enforceable rights." Jacques & Beermann, *supra* at 1, at 753. Rather, subsection (v) merely gives aggrieved individuals *standing* to go into court to vindicate the public rights that the Act protects. In *Scripps-Howard Radio v. FCC*, 316 U.S. 4, this Court addressed a statute that, like §332(c)(7)(B)(v), granted judicial review to persons whose interests were "adversely affected."



Observing that the Communications Act "did not create new private rights" but instead sought "to protect the public interest in communications," the Court emphasized that Communications-Act plaintiffs do not sue to vindicate their own private rights but, rather, "have standing only as representatives of the public interest." *Id.* at 14. Subsequently, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), this Court clarified that *Scripps-Howard*'s "standing" reference was addressed not to the Article III inquiry but, instead, to the character of the rights protected by the Communications Act. *See id.* at 737. Accordingly, "once review is properly invoked" by a Communications-Act plaintiff with Article III standing, "that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." *Id.*

The same is true here. There can be no doubt that a disappointed wireless operator has standing in the Article III sense to challenge a local zoning authority's permit denial. Under the logic of *Scripps-Howard* and *Sierra Club*, §332(c)(7)(B)(v) allows him to go into court to vindicate the publicly-oriented rights that §332(c)(7) protects. The important point for present purposes is that the applicant's standing to sue to enforce §332(c)(7)'s substantive provisions does not alter the nature – *i.e.*, public, not private – of the rights that those provisions protect. Put simply, having standing (and a cause of action) under §332(c)(7) is not the same as having personal, §1983-enforceable private rights under §332(c)(7). *Cf. Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966) (Burger, J.) (Under the Communications Act, "standing is accorded to persons not for protection of their private interest but only to vindicate the public interest.").[5]

---

[5] Further indication that §332(c)(7)(B)(v) envisions APA-like actions to enforce public rights is found in §332(c)(7)(B)(iii), which requires that the decisions of local zoning boards be "in writing and supported by substantial evidence contained in a written record." As the conference

Indeed, far from indicating the presence in §332(c)(7) of privately enforceable rights, §332(c)(7)(B)(v)'s limited cause of action actually confirms their absence. In *Gonzaga*, this Court made clear that the existence of a private remedy – even if not comprehensive in the *Sea Clammers* sense – can "buttress[]" a conclusion that a statute does not create §1983-enforceable rights. 536 U.S. at 289. The statute there at issue created within an administrative agency a review board with which aggrieved persons could file "individual written complaints." *Id.* If, based on the complaint, the board found a violation, it could require that the offending educational institution take "specific steps ... to comply" with the statutory mandate. *Id.* Without suggesting any view of whether that enforcement scheme was comprehensive for *Sea Clammers* purposes, this Court emphasized that it was sufficiently different from those at issue in *Wright* and *Wilder*, "where an aggrieved individual lacked any federal review mechanism," to counsel against "finding a congressional intent to create individually enforceable private rights" under §1983. *Id.* at 290.

The same inference – that §332(c)(7) does not create §1983-enforceable private rights – follows a fortiori here. Section 332(c)(7) goes beyond the federal *administrative* review mechanism available in *Gonzaga* to establish a specific and self-contained federal *judicial* review mechanism pursuant to which a person "adversely affected" may "commence an action" in court. *See supra* at 7-12. If the former indicates the absence of §1983-enforceable rights, then surely the latter – which is, if anything, farther removed from the *Wright-Wilder* paradigm – does, as well.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

---

report observes, "substantial evidence" is the "traditional standard used for judicial review of agency actions." H.R. Conf. Rep. No. 104-458, at 208.

Respectfully submitted,

Troy King
*Attorney General*

Kevin C. Newsom
*Solicitor General*
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

November 12, 2004